



IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE OF CHAS. BRUENE, deceased.

WESLEY DREESZEN, EMMETT DREESZEN,	)	
ELVIE DREESZEN, KENNETH BRUENE,	)	Filed September 9, 1977
MERLIN BRUENE, INA DREESZEN VOLKERT,	)	
VELMA DREESZEN GOETTSCH, RUTH BRUENE	)	
GOODBURN and GLADYS STRACKBEIN,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
ARNOLD PUTENSEN,	)	228
	)	<u>2-59105</u>
Appellee.	)	

Appeal from Ida District Court - James P. Kelley, Judge.

Interlocutory appeal from order charging extraordinary attorney fees for litigation against the shares of the residuary beneficiaries and denying such beneficiaries opportunity to answer and defend against the executor's petition for declaratory judgment. Reversed and remanded.

Morris C. Hurd, of Ida Grove, for appellants.

Richard F. Branco, of Holstein, for appellee.

Heard by Allbee, C.J., Donielson, Oxberger and Carter, JJ.; Snell, J., takes no part.

PER CURIAM

This order is explanative of and implements the bench ruling made at the conclusion of the oral argument of this appeal.

We reverse the order and judgment of the trial court entered January 27, 1976, because we conclude that the entry of such judgment was premature. Appellants were denied the right to answer the petition after their motions were overruled and the appellee was not required to offer any proof in support of the allegations of his petition for declaratory judgment, some of which were conclusory.

The prior ex parte order fixing extraordinary fees of the executor and his attorney is not conclusive of the value of such services as against the appellants. Nor was the executor's right to charge any portion of these extraordinary fees against appellants' share of the estate established as a matter of law. Appellants have made a persuasive argument that the attorney fees are, as a matter law, not chargeable against them. Our attention has not been directed to any authority authorizing any broad equitable power exercised by the trial court in charging against specific estate distributees the executor's attorney fees incurred in litigation commenced against the executor by said distributees.

Certainly neither the extraordinary fees of the executor, if any, or his attorney, if any, may be set off against the shares of the appellants in the absence of a showing of bad faith on their part in instigating the litigation in question. Because the trial court did not require a showing of bad faith this is sufficient to warrant our reversal. We do not determine at this time whether the attorneys fees are not in any event chargeable against appellants' shares. We leave that matter for further consideration by the trial court in connection with the conducting of further proceedings consistent herewith.

Reversed and remanded.